

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Biennial Regulatory Review of Regulations	)	WC Docket No. 02-313
Administered by the Wireline Competition	)	
Bureau	)	

**COMMENTS OF The National Organization For Women,  
Minority Media and Telecommunications Council, Office of Communication of the United  
Church of Christ, Inc., Philadelphia Lesbian and Gay Task Force, Alliance for Community  
Media, Alliance for Public Technology, American Association of People with Disabilities,  
American Federation of Television and Radio Artists, Black Citizens for a Fair Media,  
Communications Commission of the National Council of Churches, USA, Communications  
Workers of America, Hispanic Americans for Fairness in Media, Independent Spanish  
Broadcasters Association, Lawyers Committee for Civil Rights Under Law, Leadership  
Conference on Civil Rights, League of United Latin American Citizens, Minority Business  
Enterprise Legal Defense and Education Fund, National Asian American  
Telecommunications Association, National Asian Pacific American Legal Consortium,  
National Association for the Advancement of Colored People, National Association of Black  
Owned Broadcasters, National Association of Black Telecommunications Professionals,  
National Association of Latino Independent Producers, National Council of Hispanic  
Organizations, National Council of La Raza, National Hispanic Foundation for the Arts,  
National Hispanic Media Coalition, National Urban League, People for the American Way  
Foundation, Puerto Rican Legal Defense & Education Fund, Rainbow/PUSH Coalition,  
Telecommunications Research and Action Center, UNITY: Journalists of Color, Inc.,  
Women's Institute for Freedom of the Press**

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## SUMMARY

The National Organization for Women, Minority Media and Telecommunications Council, and 32 other organizations including civil rights groups, minority broadcasters associations, religious denominations, unions active in communications issues, and professional minority associations (NOW *et al.*), strongly support retention of the FCC's requirement that common carriers file annual employment report, Form 395. There can be no question that under Section 11, the rule remains necessary in the public interest to deter discrimination and promote equal opportunities for women and minorities.

The annual employment report was adopted in 1970 as a key component of EEO rules aimed at implementing the national policy against discrimination in employment and ensuring equal employment opportunities in the common carrier industry. Regardless of the degree of economic competition that may have developed in the intervening years, discrimination based on race and gender in employment remains contrary to the public interest. Form 395 continues to provide information essential to the Commission in meeting its public interest responsibilities. This information is also needed by the Advisory Committee on Diversity for Communications in the Digital Age to fulfill its mandate to increase opportunities for employment by minorities and women in the communications sector.

A review of the data from recent 395 filings demonstrates that unfortunately, disparities in employment opportunities continue to be a problem in the common carrier industry. A study conducted by the Institute for Public Representation, which is attached to these comments found:

- Overall employment of women in the common carrier industry has declined from 52% in 1973 to 44% in 2002
- Overall employment of women in the common carrier industry in 2002 lags behind private industry generally
- Women remain underrepresented as officials and managers and in the top four job categories
- Women continue to hold the vast majority of positions in the "office and clerical" category

- While overall employment of minorities in the common carrier industry has nearly doubled since 1973, minorities remain underrepresented in the top four job categories
- While total minority employment by common carriers is comparable to private industry, Hispanics are employed at much lower rates

This study, which could not have been conducted in the absence of the Form 395 filing requirements, demonstrates the need for the FCC to do more, not less, to promote equal opportunities.

Requiring common carriers to file Form 395 is neither burdensome nor duplicative of other filing requirements. Not only does the FCC collect employment information for different reasons than the EEOC, but it collects it from many more companies. Most importantly, the FCC requires that the employment statistics be made available to the public. Public disclosure provides a deterrent against discrimination. Moreover, the public has a strong interest in being able to learn about the employment practices of the carriers on which it depends.

Finally, commenters urge the FCC to modify the rule to require carriers to file their reports electronically and to post the reports on the FCC's webpage. Electronic filing would further reduce the already minimal burdens on common carriers, make public access easier, and result in more accurate information on which to base future policies.

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**COMMENTS OF NOW *ET AL.***

The National Organization For Women, Minority Media and Telecommunications Council, and a broad coalition of 32 other organizations including some of the nation’s principal civil rights organizations, both of the nation’s associations of minority broadcasters, both of the unions active in communications issues, religious organizations, and the professional association of African Americans in the telecommunications industry (NOW *et al.*),<sup>1</sup> respectfully submit comments in response to the *Biennial Regulatory Review of Regulations Administered by the*

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<sup>1</sup> The full list of parties to these comments is: The National Organization For Women, Minority Media and Telecommunications Council, Office of Communication of the United Church of Christ, Inc., Philadelphia Lesbian and Gay Task Force, Alliance for Community Media, Alliance for Public Technology, American Association of People with Disabilities, American Federation of Television and Radio Artists, Black Citizens for a Fair Media, Communications Commission of the National Council of Churches, USA, Communications Workers of America, Hispanic Americans for Fairness in Media, Independent Spanish Broadcasters Association, Leadership Conference on Civil Rights, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian American Telecommunications Association, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association of Latino Independent Producers, National Council of Hispanic Organizations, National Council of La Raza, National Hispanic Foundation for the Arts, National Hispanic Media Coalition, National Urban League, People for the American Way Foundation, Puerto Rican Legal Defense & Education Fund, Rainbow/PUSH Coalition, Telecommunications Research and Action Center, UNITY: Journalists of Color, Inc., Women's Institute for Freedom of the Press

*Wireline Competition Bureau (Wireline NPRM).*<sup>2</sup> These comments address paragraphs 4-6 of the *Wireline NPRM*, wherein the FCC requests comment on whether it should “continue to require carriers to file annually FCC Form 395 and the report of employment-related discrimination complaints.”<sup>3</sup> As organizations dedicated to promoting equality by supporting legal, political, social, and economic change, NOW *et al.* commend the Commission on its past efforts to ensure equal employment opportunity in the telecommunications industry and, in furtherance of that goal, urge the Commission to continue mandatory annual filing of Form 395 and to modify the rule to allow electronic filing.

#### **I. CONTINUED MONITORING OF COMMON CARRIER EMPLOYMENT PRACTICES IS NECESSARY IN THE PUBLIC INTEREST**

In the *Wireline NPRM*, the Commission requests comment “on whether continued monitoring of common carrier employment practices by the Commission pursuant to section 1.815 and utilizing FCC Form 395 is necessary in the public interest.”<sup>4</sup> This review is being conducted pursuant to Section 11 of the Communications Act, as amended, which requires that before the Commission can repeal or modify a rule, it must find that the regulation is “no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”<sup>5</sup>

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<sup>2</sup> 69 Fed. Reg. 12814 (March 18, 2004). Paragraphs 4-6 of the *Wireline NPRM* are based on two comments in the Wireless Bureau’s 2002 *Biennial Review of Telecommunications Regulations*. 17 FCC Rcd 18933 (2003). The Wireless NPRM did not request comment on Form 395 or any equal employment opportunity issues. The current *Wireline NPRM* cites the comments in the wireless proceeding as a basis for considering whether to continue requiring common carriers to file Form 395. See *Wireline NPRM* ¶ 4 n.12.

<sup>3</sup> *Wireline NPRM* ¶ 6.

<sup>4</sup> *Wireline NPRM* ¶ 6.

<sup>5</sup> 47 USC § 161 (a)(2). The D.C. Circuit recently upheld the Commission’s interpretation of “necessary” as meaning useful but not necessarily indispensable. *Cellco Partnership v. Federal Communications Commission*, 357 F.3d 88, 97-99 (D.C. Cir. 2004).

Section 1.815 of the Communications Act, as amended, requires that “[e]ach common carrier licensee or permittee with 16 or more full time employees shall file with the Commission, on or before May 31 of each year, on FCC Form 395, an annual employment report.”<sup>6</sup> The Commission adopted this reporting requirement as part of a package of EEO rules aimed at eliminating discrimination on the basis of race or gender in the common carrier industry and ensuring equal employment opportunities.<sup>7</sup> Section II of Form 395 requires companies to report the number of full-time employees as of a certain date, broken down according to job category, gender and minority status. Section V of Form 395 asks companies to advise the Commission of any complaints filed against it that allege violations of any equal employment provisions.

**A. The National Policy Of Non-Discrimination That Initiated The Commission’s Monitoring Of Equal Employment Opportunities In The Common Carrier Industry Remains Important Today**

In adopting EEO rules for common carriers similar to those the Commission had previously adopted for broadcasters, the Commission found that:

[u]nder the provisions of the Communications Act of 1934, as amended, [the Commission] is required to grant licenses only when shown to be in the public interest, convenience and necessity. *It is clear to us that discriminatory employment practices by a common carrier licensee or permittee are not compatible with the public interest.*<sup>8</sup>

The Commission concluded that it “has an independent responsibility to effectuate the strong *national policy* against discrimination in employment.”<sup>9</sup> Moreover, EEO rules were necessary because “[t]he public is required to do business with” common carriers.<sup>10</sup> The Commission

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<sup>6</sup> 47 C.F.R. § 1.815(a).

<sup>7</sup> *Rule Making to Require Communications Common Carriers to Show Nondiscrimination in their Employment Practices*, 24 F.C.C.2d 725, 729 (1970 Report).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.* at 727 (emphasis added).

<sup>10</sup> *Id.* at 726.

found that the information provided in the Form 395 would provide it “with a basis for the examination of industry employment patterns, and will allow [the Commission] to raise appropriate questions as to the cause of such patterns.”<sup>11</sup>

Nothing that has happened in the years since the FCC first imposed the reporting requirement on common carriers has changed such that it is no longer necessary in the public interest to collect this information. Regardless of whether or not “meaningful economic competition” has developed in the common carrier industry, discriminatory hiring practices and employment trends remain contrary to national policy and the public interest.<sup>12</sup>

Indeed, the FCC recently reaffirmed its commitment to EEO in revising its EEO rules for broadcasters and cable operators in 2002. There, the Commission noted that “discrimination is so fundamentally inconsistent with the public interest that rules are justified to deter even the possibility of discrimination.”<sup>13</sup>

Similarly, the Commission acknowledged the continued obstacles faced by minorities and women in the communications industry when it recently created the Advisory Committee for Diversity for Communications in the Digital Age to Diversity Committee to “assist the agency in formulating new ways to create opportunities for minorities and women in the communications sector” and to “advise the FCC on policies and practices designed to increase the diversity of ownership and create employment opportunities in the communications sector.”<sup>14</sup>

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<sup>11</sup> *Id.* at 728.

<sup>12</sup> 47 U.S.C. § 161(a)(2).

<sup>13</sup> *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rule Making*, 17 FCC Rcd 24018, 24039 (2002).

<sup>14</sup> *Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues, Public Notice*, May 19, 2003.



The FCC should continue to further the national policy of promoting equal opportunity employment by continuing to collect the data from Form 395, tracking employment trends, and investigating where the data suggests possible discrimination.

**B. Disparities in Employment Opportunities Continue To Be A Problem In The Common Carrier Industry**

The FCC's EEO rules for common carriers, including the requirement of filing Form 395, were adopted at a time when women and minorities were subject to both overt and covert discrimination and were, consequently, significantly underrepresented in the common carrier workforce. During the late 1960s, female employees were almost entirely funneled into clerical and operator positions and minorities were concentrated in unskilled and blue collar categories. In 1970, the EEOC, NOW, and others petitioned the FCC to deny a proposed rate of return increase for AT&T's long-distance telephone service on the basis of the company's alleged discriminatory hiring policies.<sup>15</sup> These organizations argued that AT&T practiced discriminatory employment since very few women or minorities worked in upper management positions at the company.<sup>16</sup> For example, in 1968 the Bell system had only 3 women in director level positions and no women in any management positions ranked higher than the director level, while 1,099 men held director level positions and 368 held even higher positions.<sup>17</sup> Similarly, minorities were underrepresented in the common carrier workforce during this time. Black workers were

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<sup>15</sup> *Petitions Filed By the Equal Employment Opportunity Commission et al.* 27 FCC 2d 309 (1971) (*EEOC Petitions*). Subsequently, AT&T entered into a series of Consent Decrees with the EEOC through which, among other things, the company implemented EEO practices.

<sup>16</sup> *Id.*

<sup>17</sup> Lois Katherine Herr, *Women, Power, and AT&T: Winning Rights in the Workplace*, 157 (2003).

10% of the Bell system workforce in 1971, and primarily occupied positions in two categories, service workers (35.8%) and semi-skilled operatives (25.4%).<sup>18</sup>

To assess the progress made by women and minorities over the past thirty years, the Institute for Public Representation conducted a study of employment statistics using the information provided by the Form 3952. The report, *An Analysis of the Status of Women and Minorities in Common Carriers* (IPR Report) is attached to these comments. The Report found:

- Overall employment of women in the common carrier industry has declined from 52% in 1973 to 44% in 2002
- Overall employment of women in the common carrier industry in 2002 lags behind private industry generally
- Women remain underrepresented as officials and managers and in the top four job categories
- Women continue to hold the vast majority of positions in the “office and clerical” category
- Overall employment of minorities in the common carrier industry has nearly doubled since 1973
- Minorities remain underrepresented in the top four job categories
- While total minority employment by common carriers is comparable to private industry, Hispanics are employed at much lower rates

Thus, it is clear that equal opportunity in the common carrier industry has not been achieved.

The decline in the percentage of women employed in the common carrier industry is particularly troubling. Not only did the percentage of women employed in the common carrier industry over the past thirty years decrease from 52% to 44%, but it is below the national average for private industry of 48%.<sup>19</sup> Moreover, some of the Form 395 data suggests that women have been disproportionately affected by layoffs. For example, in its 395 Form for 2002, Sprint Communications Company L.P. reported that since the last reporting period, 1,618 fewer women but only 410 fewer men were employed by the company.<sup>20</sup> The IPR Report also found that

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<sup>18</sup> Bernard E. Anderson, *Equal Opportunity and Black Employment in the Telephone Industry*, in *Equal Employment Opportunity and the AT&T Case* 179, 190 (Phyllis A. Wallace ed. 1976).

<sup>19</sup> IPR Report at 6.

<sup>20</sup> *Sprint Communications Company L.P. Common Carrier Annual Employment Report* (May 2002).

women continued to hold the vast majority (78%) of office and clerical positions, while remaining underrepresented among the top-four job categories and in the specific categories, including professionals and technicians.<sup>21</sup>

Several studies by researchers at the Annenberg Public Policy Center have similarly found that women are underrepresented in the higher level jobs. One report issued in 2001 concluded that “Communications companies are innovating in technology, ways of sending and receiving information, and economic models for the 21<sup>st</sup> century – but their executive suites and boardrooms still largely resemble the stereotyped practices of the 1950s.”<sup>22</sup> This report analyzed the percentage of executives at leading telecommunications companies who were women. It found that several companies had no female executives, while the average was only 10%.

COMPANY	EXECUTIVES WHO ARE WOMEN	TOTAL EXECUTIVES REPORTED	PERCENT EXECUTIVES WHO ARE WOMEN
ALLTEL	0	13	0%
AT&T	2	20	10%
Bell South	2	20	10%
Century Tel	1	16	6%
Citizens Communications	0	20	0%
Echostar	1	10	10%
Nextel	1	20	5%
Qwest	0	20	0%
SBC Communications	6	19	32%
Sprint	2	20	10%
Telephone and Data Systems	1	20	5%
Verizon	3	19	16%
Worldcom	0	10	0%
TOTAL	28	291	10%

<sup>21</sup> *IPR Report* at 6-7.

<sup>22</sup> Lorie Slass, Annenberg Public Policy Center, *Progress or No Room at the Top? The Role of Women in Telecommunications, Broadcast, Cable and E-Companies*, 13 (2001).

*Slass*, Table 8. A more recent report by the Annenberg Public Policy Center also found that “[t]he disparity between the percentage of women in executive leadership and the percentage of women managers suggests the glass ceiling is firmly in place.”<sup>23</sup>

The IPR Report found that while minorities have made some gains since the 1970s in all job categories, the percentage of minorities in the top categories remains below the percentage of minorities in the workforce generally.<sup>24</sup> In addition, the IPR Report uncovered some anomalies. For example, in 2002, common carriers employed approximately 40,500 black women and only 25,000 black men, while every other minority group reported on the 395 Form had a higher number of men than women.<sup>25</sup> Furthermore, common carrier employment of Hispanics, the fastest growing minority in nationwide employment, has increased from 2% in 1973 to only 7% in 2002. At the current rate of growth, it will be 2023 before Hispanic employment in the common carrier industry reaches the current national average of 11%.<sup>26</sup>

These findings indicate the need for the FCC to do more, not less, to promote equal opportunities. Eliminating the Form 395 requirement would represent a clear step backwards. Without access to the Form 395s, IPR would not have been able to conduct this study and assess what progress has been made and illuminate where problems remain.

## **II. THE COMMISSION’S COLLECTION OF THE FCC 395 FORM IS NOT DUPLICATIVE NOR IS FILING OVERLY BURDENSOME.**

As demonstrated above, the collection of employment data is essential to the Commission’s and the public’s ability to monitor and identify potentially discriminatory employment practices and determine whether there is a “general pattern of disregard of equal

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<sup>23</sup> Erika Falk, Annenberg Public Policy Center, *The Glass Ceiling Persists: The 3<sup>rd</sup> Annual APPC Report on Women Leaders in Communication Companies*, 12 (December 2003).

<sup>24</sup> *IPR Report* at 9.

<sup>25</sup> *Id.* at 10-11.

<sup>26</sup> *Id.* at 10.

employment practices.”<sup>27</sup> The 395 Form provides an appropriate means for collecting gender and race employment data that is not unnecessarily duplicative, and does not place an undue burden on common carriers.

**A. Many Common Carriers Are Not Required To File At Both The Commission And The EEOC, Thus Filing Is Not Duplicative**

In the *Wireline NPRM*, the Commission notes a commenter’s argument that some “federal and state equal employment opportunity (EEO) agencies collect identical or similar information” to the information collected on the 395 Form and that therefore, the 395 Form was needless.<sup>28</sup>

The Commission has previously considered and rejected such arguments. In 1970, the Commission determined that similar employment reports filed at the FCC and the EEOC were not unnecessarily duplicative.<sup>29</sup> The Commission stated that it had “an independent responsibility to effectuate the strong national policy against discrimination in employment” and that “[a]ction by the Commission will complement, rather than conflict with any other action by other agencies specially created to enforce the policy and equality in employment.”<sup>30</sup> Since 1970, neither the filing requirements for the FCC nor the EEOC have changed significantly. In

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<sup>27</sup> *Wireline NPRM* ¶ 5 (quoting *EEOC Petitions*, 27 FCC 2d 309, 311 (1971)).

<sup>28</sup> *Wireline NPRM* ¶ 4. Although commenters cited in the NPRM suggest that redundancy exists between the Commission’s filing requirements and those of state agencies, they cite no example of duplicative state requirements. But even if common carriers were required to file employment reports with some state agencies, it would be extremely burdensome for the FCC to collect data from these agencies. Moreover, unless the FCC could get consistent data from all 50 states and the District of Columbia, the Commission would not be able to accurately determine national trends.

<sup>29</sup> *1970 Report*, 24 F.C.C.2d at 727 ¶ 4. While the Commission acknowledged in its 1970 Report that Form 395 may result in minor burden or duplication for some carriers, the level was so low that the Commission easily dismissed it and determined that Form 395 was in line with Federal regulations requiring that costs and burdens to companies be minimized when similar information is requested by different agencies. *Id.*

<sup>30</sup> *Id.*

fact, advances in computer technology have made tracking employment statistics immeasurably easier than in 1970. Thus, there has been no adverse change that necessitates reevaluating the 1970 determination that Form 395 is not duplicative.

In any case, the assumption that the FCC 395 Form results in duplicative filings is simply not true for many common carriers. The EEOC only requires that all employers with 100 or more employees file an annual EEO-1 Form.<sup>31</sup> In contrast, Form 395 must be filed by each “common carrier licensee or permittee with 16 or more full time employees.”<sup>32</sup> Of the 453 companies with more than 16 fulltime employees included in the IPR Report, 308 had fewer than 100 employees. While this data does not include all common carriers, it does suggest that a large proportion of common carriers do not have to file with the EEOC at all.

In addition to exempting companies with fewer than 100 employees, the EEOC further exempts subsidiaries with less than 50 employees from having to file a form separate from their parent company.<sup>33</sup> No such exemption is made for subsidiaries or affiliates under the Commission rules. If the EEO-1 Form were the sole method of employment data collection, a significant number of subsidiaries with between 16 and 50 employees would not have to file employment reports, and potential problems of discrimination could be obscured. For example, CenturyTel’s Form 395s show that has a total of 3,078 employees with 1,046 women or 34%. However, its subsidiary, CenturyTel of Central Louisiana has 26 employees, none of whom are

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<sup>31</sup> 29 C.F.R. § 1602.7.

<sup>32</sup> 47 C.F.R. § 1.815(a).

<sup>33</sup> 29 C.F.R. § 1602.7. 29 C.F.R. § 1602.7 requires that filing occur in compliance with instructions on the EEO-1 form. *Id.* The EEO-1 form instructs that in addition to filing a consolidated report of all employees, multi-establishment employers only file a separate report for each establishment with 50 or more employees. *Employer Information Report Standard Form 100, Rev 3-97, EEO-1 100-118 Instruction Booklet* p. 1-2, available at: <http://www.eeoc.gov/eeo1survey/e1instruct.pdf>.

women. CenturyTel of Eastern Oregon has 44 employees but only one woman, and she is a clerical worker.<sup>34</sup> This information about the subsidiaries would not be reported to the EEOC.

Because many common carriers have under 100 employees or subsidiaries with under 50 employees, the FCC could not obtain employment reports for those companies from the EEOC. It is not in the public interest for the FCC to give up the ability to monitor and track employment trends at a significant number of common carriers.

**B. The EEO-1 Form Is Not A Substitute For The FCC 395 Form Because The EEO-1 Form Is Not Publicly Available**

Even in the minority of cases where a company has more than 100 employees and thus files with both the FCC and EEOC, the filing is not unnecessarily duplicative because without the Form 395, **the public would have no means** to access and review statistics regarding common carrier employment practices.

Pursuant to 47 CFR § 1.815(b), a copy of every annual employment report filed with the FCC is available for public inspection. In addition, sections 21.307, 22.321 and 23.55 all require that a copy of every annual employment report be maintained locally for public inspection.<sup>35</sup> In contrast, the EEOC does not allow public access to collected information.<sup>36</sup>

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<sup>34</sup> *CenturyTel Common Carrier Annual Employment Report* (May 2002); *CenturyTel of Central Louisiana Annual Employment Report* (May 2002); *CenturyTel of Eastern Oregon Common Carrier Annual Employment Report* (May 2002).

<sup>35</sup> 47 C.F.R. §§ 21.307(f)(1)-(2), 22.321(e)-(f), 23.55(f)(1)-(2), 90.168(e)-(f).

<sup>36</sup> 29 C.F.R. § 1602.7. Researchers have attempted to get employment data from the EEO but nothing has been made available besides the aggregated trend reports. For example, A Rutgers University Law School Study was stalled in 2001 when the EEOC, which had provided researchers with individual company reports identifying each company by number for anonymity, has been unwilling to provide even anonymous individual information. Alfred and Ruth Blumrosen, *The Realities of Intentional Job Discrimination in America*, Rutgers University (2002).

Public disclosure is important for several reasons. First, disclosure, in and of itself, may deter discrimination. Second, the public can assist the FCC in enforcing its EEO policies in two ways. Armed with factual information, members of the public are in a better position identify problems and work to resolve them directly with the companies in their communities. The public can also help the FCC by analyzing such information to identify problems requiring the Commission's attention.

Access to employment data is also important for NOW and other civil rights organizations. Such organizations need the type of information provided by Form 395 to research employment practices in the common carrier industry and develop proposals and programs to serve their constituents. Whether a company offers equal opportunities to women and minority is of interest to consumers who are trying to decide which carrier to do business with. Such information is also of interest to anyone seeking employment in the common carrier industry. The 395 data also has great potential value to historians and other academics because it covers a long period of time. The 395 data has many present and historic uses to the public and filing of that data should continue.

### **C. The Requirement To File Form 395 Is Not Burdensome**

In addition to not being unnecessarily duplicative, filing Form 395 is not unduly burdensome to common carriers. Assertions that the Commission should eliminate section 1.815 because it causes "needless burden of paperwork"<sup>37</sup> have already been assessed and dismissed by the FCC. In 1970, the Commission determined that filing both 395 and EEO-1 forms was not

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<sup>37</sup> *Cellular Telecommunication & Internet Association's Petition for Rulemaking Concerning the Biennial Review of Regulations Affecting CMRS Carriers*, WT Docket No. 02-310, filed July 25, 2002 at 6.



unduly burdensome to common carriers.<sup>38</sup> Neither the FCC 395 nor the EEO-1 Form has substantially changed since 1970, therefore nothing has changed to cause the FCC to reconsider its conclusion that even the filing of both forms is not burdensome.<sup>39</sup>

Moreover, in its review of the FCC 395 Form pursuant to the Paper Reduction Act of 1995, the Office of Management and Budget determined that approximately **one hour** is required to complete Form 395.<sup>40</sup> Thus, there is no basis for any claim that filing the 395 Form results is burdensome. Moreover, NOW *et al.* propose that the FCC can make the filing of Form 395s even easier for carrier by mandating electronic instead of paper filing.<sup>41</sup>

#### **D. Form 395 Does Not Duplicate Information Gathered In Compliance With Other FCC Rules**

The *Wireline NPRM* also asks whether the 395 Forms unnecessarily duplicate the requirement set forth in sections 47 C.F.R. § 21.307(d)(1), 47 C.F.R. §22.321(c), and 47 C.F.R. §23.55(d)(1) that common carriers file an annual report of all equal employment complaints filed.<sup>42</sup> While Form 395, Section V, asks for a list of any complaints alleging EEO violations, this requirement does not result in duplicate filings. Section V of Form 395 merely provides a method for filing the reports required in the other rules. In fact, the title of Section V of the 395 Form is “Report of Discrimination Complaints Pursuant to 47 C.F.R. 21.307, 22.321, and

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<sup>38</sup> *1970 Report*, 24 FCC 2d at 727.

<sup>39</sup> *See Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 529, 534-35 (2d Cir. 1977) (stating that the FCC could not eliminate the requirement to file broadcast EEO program reports without adequate evidence of increased burden, specifically stating that “only a few hours a year would be required to complete it.”) *Id.*

<sup>40</sup> 67 Fed. Reg. 64417 (2002).

<sup>41</sup> *See infra* part IV.

<sup>42</sup> *Wireline NPRM* ¶5-6 (referring to 47 C.F.R. § 21.307(d)(1), 47 C.F.R. §22.321(c), 47 C.F.R. §23.55(d)(1)). Section 21.307 applies to common carriers and Multipoint Distribution Service non-common carrier licensees or conditional licensees, 47 C.F.R. 21.307(a), section 22.321 applies to Public Mobile Services licensees, 47 C.F.R. 22.321, 23.55 applies to International Fixed Public Radio services, 47 C.F.R. 23.55(a).

23.55.”<sup>43</sup> The other EEO information collected in Form 395 (e.g. report of full-time and part-time employees by race and gender) is not duplicated by any Commission rule or reporting requirement.

The FCC also seeks comment on whether filing of Form 395 is necessary to identify or address issues related to unlawful discrimination by common carriers because “sections 21.307, 22.321, and 23.55 of the Commission’s rules provide mechanisms by which complaints alleging unlawful discrimination may be filed against carriers.”<sup>44</sup> While those sections allow complaints to be filed by individuals against common carriers, they do not provide information similar to Form 395.<sup>45</sup> Thus, these individual complaints cannot substitute for the annual reports filed by the common carriers.

Moreover, these rules require that “[c]omplaints indicating a general pattern of disregard of equal employment practices which are received against a licensee or permittee who is required to file an employment report to the Commission under Sec. 1.815(a) of this chapter will be investigated by the Commission.”<sup>46</sup> Eliminating the requirement of filing annual employment reports could inadvertently end the Commission’s ability to conduct any investigations of general patterns. Clearly, Form 395 is meant to assist the FCC to examine overall industry employment trends in a way that other rules do not. Form 395 is specifically useful when several individual complaints are filed, a trend of disregarding equal employment practices may exist, or the Commission needs more background and historical information in order to conduct a proper investigation and take appropriate action. Eliminating the 395 filing requirement in section

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<sup>43</sup> *Common Carrier Annual Employment Report FCC Form 395*.

<sup>44</sup> *Wireline NPRM* ¶ 6.

<sup>45</sup> 47 C.F.R. §§ 22.321(d), 21.307(e), 23.55(e).

<sup>46</sup> 47 C.F.R. §§ 21.307(e)(2); *see also* 22.321(d)(5), 23.55(e)(2).

1.815 would result in the gutting of several other vital Commission rules that depend on the information gathered in those forms.

### **III. THE INFORMATION COLLECTED VIA FORM 395 IS VITAL TO THE DIVERSITY COMMITTEE'S ABILITY TO FULFILL ITS MISSION.**

Not only are the Form 395s necessary in the public interest for the FCC and the public to assess whether common carriers are providing equal opportunities to minorities and women, but such information is crucial to the mission of the Advisory Committee for Diversity for Communication in the Digital Age (Diversity Committee).

The Diversity Committee was established last year to create an environment “[w]hereby all Americans, including minorities and women, have access to opportunities to participate in the communications industries.”<sup>47</sup> In his speech to the American Bar Association Summit, Chairman Powell explained that:

It is not only our hope, but indeed our mandate, that this Diversity Committee not become a ceremonial post, but instead that it be a working body that helps direct the Commission toward the worthy and worthwhile goal of diversity in the modern communications workplace.<sup>48</sup>

The Diversity Committee's mission is to recommend to the Commission, “[p]olicies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries.”<sup>49</sup> In pursuit of this mission, the Diversity Committee has the following responsibilities: 1) developing strategies that will enhance participation by minorities and women in telecommunications and related industry transactions,

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<sup>47</sup> *Diversity Committee Charter, Section B*, available at: <http://www.fcc.gov/diversityFAC/docs/charter.doc>.

<sup>48</sup> *Remarks of Chairman Michael K. Powell at the American Bar Association Summit, “Diversity in the Legal Profession: Opening the Pipeline,”* (October 23, 2003) Washington, D.C. available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-240447A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-240447A1.doc).

<sup>49</sup> *Advisory Committee on Diversity for Communications in the Digital Age Mission Statement*, available at <http://www.fcc.gov/DiversityFAC>.

including timely knowledge of potential transactions and access to the necessary capital; 2) developing strategies to increase educational training for minorities and women that facilitates opportunities in upper level management and ownership; 3) developing strategies to enhance participation and ownership by minorities and women in the newly developing industries based on new technologies; and 4) gathering the information and performing the analyses that are necessary for meeting the Committee's responsibilities.<sup>50</sup>

Two of the enumerated responsibilities are especially dependent upon the type of information contained in Form 395. To fulfill the second responsibility of facilitating upper level job opportunities for minorities and women, the committee must be able to monitor how many women and minorities are in upper level jobs. The fourth responsibility requires the Diversity Committee to gather and analyze information necessary to increase opportunities for minorities and women. Without the information from Form 395s, the Diversity Committee would lack the tools needed to develop effective strategies as well as to analyze whether the Commission is meeting its policy goals. Thus, the advisory committee process would become an exercise in futility.

#### **IV. THE COMMISSION SHOULD MODIFY SECTION 1.815 TO REQUIRE ELECTRONIC FILING OF FORM 395**

Although NOW *et al.* strongly urge the FCC to retain the requirement that common carriers file Form 395s, we do urge the Commission to modify the method of filing. Specifically, we request that the Commission require companies to file this information electronically and for the Commission to make this information available on its website. The

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<sup>50</sup> *Advisory Committee on Diversity for the Communications in the Digital Age Responsibilities*, available at <http://www.fcc.gov/DiversityFAC/>.

Commission has already mandated similar electronic filing of Broadcast Form 396-A and multi-channel video programming distributor EEO Program Annual Employment Reports.<sup>51</sup>

Electronic filing would have multiple benefits. First, as noted *supra*, it would reduce the already minimal burden Form 395 places on companies. Second, it would make it easier for the Commission and the Diversity Committee to compile and analyze the data. Third, it would make it easier for the public to access the data. As IPR researchers discovered, it was not possible, much less easy to obtain all of Form 395s at the FCC, despite 47 CFR § 1.815(b)'s requirement that a copy of every annual employment report filed with the FCC be available for public inspection. Currently, the files are kept in the Public Reference Center, but there is no way to know when files are missing, whether the companies failed to submit the forms, whether they have been misplaced, or if they are in use elsewhere at the FCC. Electronic filing should eliminate this problem and result in more accurate and timely analysis.

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<sup>51</sup> *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056, 23059 (1998); *Review of Broadcast and Cable Equal Opportunity Rules and Policies*, 17 FCC Rcd. 24018, 24024 (2002). *See also Media Bureau Implements New EEO Forms, Mandatory Electronic Filing of FCC FORM 396-A*, 18 FCC Rcd 4877 (2003).

## CONCLUSION

For the foregoing reasons, NOW *et al.* respectfully request that the Commission maintain its annual employment report filing requirement for common carriers and modify Section 1.815 to allow common carriers to electronically file Form 395.

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